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85-1254

No. ____

Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

October Term, 1985

United States of America ..... *Respondent*

V.

John S. Ferguson ..... *Petitioner*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the provisions of 18 U.S.C. §3161(c)(2) can, consistent with due process of law, be waived by a defendant who is without knowledge of his rights under the statute.

Whether a trial court denies a defendant a fair and impartial trial by restricting cross-examination of a key government witness pursuant to Rule 609(c) of the Federal Rules of Criminal Procedure through exclusion of an expunged felony conviction where the witness is still engaged in the criminal activity which provided the basis for the expungement.

Whether a trial court denies a defendant a fair and impartial trial by instructing the jury prior to the closing arguments in violation of Rule 30 of the Federal Rules of Criminal Procedure.

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No. ____

In the

Supreme Court of the United States

October Term, 1985

United States of America ..... *Respondent*

V.

John S. Ferguson ..... *Petitioner*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John S. Ferguson petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed October 17, 1985, is attached hereto as Appendix A, Infra, (P. A-1). The denial of Petitioner's Motion for Rehearing and Rehearing En Banc is attached as Appendix B, Infra (P. B-1).

The judgment of the Court of Appeals was entered October 17, 1985. A timely Petition for Rehearing and Request for Rehearing En Banc was denied on November 26, 1985. This Petition for Certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FEDERAL STATUTES

18 U.S.C. §3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears

through counsel or expressly waives counsel and elects to proceed pro se.

FEDERAL RULES

Rule 609 of the Federal Rules of Evidence provides, in pertinent part:

> (a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination * * * .
>
> * * *
>
> (c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted * * *.

Rule 30 of the Federal Rules of Criminal Procedure provides, in pertinent part:

> The court shall inform counsel of its proposed action upon * * * requests (for jury instructions) but the court shall instruct the jury after the arguments are completed.

STATEMENT OF THE CASE

On May 22, 1984, a one count indictment was returned by the Federal Grand Jury for the Eastern District of Arkansas against Petitioner charging him with filing a false statement in violation of 21 U.S.C. §843(a)(4)(a) (Appendix C). On May 29, 1984, at the time of arraignment, Petitioner entered a plea of not guilty to the single charge.

On August 20, 1984, the government obtained for strategical purposes a new indictment (referred to by the government as a "superseding indictment" before the Court of Appeals realleging Count I of the May 22, 1984 indictment and adding a new and separate count charging Petitioner with violating the provisions of 21 U.S.C. §841(a)(1) by illegally distributing a controlled substance. (Appendix D).

On August 23, 1984, the indictment was provided to trial counsel at the United States Marshall's office in the Eastern District of Arkansas. The Petitioner was never arraigned on the new indictment or the new charge.

On August 27, 1984, Petitioner's trial counsel wrote a letter to the United States Magistrate waiving Petitioner's right to an "appeal" (sic) on Count II and indicating that Petitioner would enter a plea to the "new charges" prior to the trial of the case. (Appendix E). [1]

On September 18, 1984, Petitioner's trial counsel filed a Motion for Relief from Prejudicial Joinder requesting severance of the new indictment charge. (Appendix F). The trial court denied Appellant's motion.

On September 18, 1984, Petitioner's trial began.

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[1] It should be noted that a copy of the letter was not sent to the Petitioner.

During the trial of the case, the trial court, among other things, refused to allow defense counsel the opportunity to impeach the government's key witness with certain felony convictions the witness had attempting to obtain controlled substances by fraud and obtaining controlled substances by fraud. Instead, trial counsel was permitted the opportunity to question the witness about the underlying facts surrounding the convictions. (T. 218-221) The trial court also, without an agreement of counsel, instructed the jury prior to oral arguments contrary to the provisions of Rule 30 of the Federal Rules of Criminal Procedure.

The jury returned a verdict of guilty as charged on both counts of the second indictment. Petitioner was sentenced by the trial court to serve a two year sentence on Count II of the second indictment and on Count I imposition of sentence was suspended and Petitioner was placed on probation with supervision for a period of three years to run consecutive to the sentence imposed on Count II.

The Eighth Circuit Court of Appeals affirmed the convictions.

REASONS FOR GRANTING THE WRIT

WHETHER THE PROVISIONS OF 18 U.S.C. §3161(c)(2) CAN, CONSISTENT WITH DUE PROCESS OF LAW, BE WAIVED BY A DEFENDANT WHO IS WITHOUT KNOWLEDGE OF HIS RIGHTS UNDER THE STATUTE.

This case presents an important question which should be resolved by this Court, particularly in light of the Court's recent decision in *United States v. Rojas-Contreras*, 54 U.S.L.W. 4061, ____ U.S. ____ (1985).

In *United States v. Rojas-Contreras*, this Court held, in a case involving a superseding indictment which corrected a typographical error, that a superseding indictment did not restart the thirty (30) day defense preparation period found in 18 U.S.C. §3161(c)(2). The Court also held that where a superseding indictment added a substantive offense the appropriate relief was an ends-of-justice continuance pursuant to Section 3161(h)(8) of the Speedy Trial Act, 18 U.S.C. §3161, et seq.

Nevertheless, the Eighth Circuit Court of Appeals held in the case, sub judice, that although Petitioner was tried less than thirty (30) days after the second indictment he waived his rights under 18 U.S.C. §3161(c)(2) by failing to raise an objection. (Opinion pages 4-5).

The undisputed and uncontradicted record in this case is that Petitioner's trial on Count II of the new indictment commenced less than thirty (30) days from the date on which Petitioner first appeared through trial counsel. Moreover, Petitioner became aware of the additional charge in the second indictment only three (3) days before trial and upon learning of the new charge attempted to locate witnesses that he felt might help him in his defense. (Sworn Statement in support of motion for new trial—Appendix G). One of those witnesses was his former housekeeper, which he was

unable to locate prior to trial. Several months later Petitioner did make contact with the witness and the nature of her testimony, along with Petitioner's sworn statement as to the events which transpired around the new charge, was the subject of Petitioner's Motion for New Trial which was denied by the trial court and affirmed by the Eighth Circuit Court of Appeals. (Opinion, p. 12-13).

Petitioner was undeniably prejudiced by lack of preparation time and was unaware of his rights under the Speedy Trial Act.

The obvious and clear intent of Congress in enacting §3161(c)(2) of the Speedy Trial Act was to prevent an unknowing and unintentional loss of a guaranteed right without the express consent of a defendant charged with a criminal offense.

Section 3161(c)(2), by its express and plain language, requires much more of a defendant than an objection, or even a motion for continuance. At a minimum, a defendant should not be said to have lost his rights under §3161(c)(2) unless it is demonstrated by the record that he was aware of his rights or that his counsel agreed to a trial in less than thirty (30) days after an intelligent and deliberate discussion in open court. Anything less would violate a defendant's rights to due process of law as provided by the Fifth Amendment to the United States Constitution.

The language used in §3161(c)(2) is forthright and direct and to construe it as the Eighth Circuit Court of Appeals suggests would be to ignore its plain meaning and obvious intent. See *Huddleston v. United States*, 415 U.S. 814, 831-32 (1974) and *United States v. Willis*, 505 F.2d 748, 749 (9th Cir. 1974), cert. denied, 420 U.S. 963 (1975).

While trial counsel did not move for a continuance under the ends-of-justice provisions of the Speedy Trial Act, i.e., 18 U.S.C. §3161(h)(8), he did move for a severance of

counts on the basis of prejudicial joinder. This would have given Petitioner an additional time period to prepare his defense and permitted him the opportunity to avoid prejudice, which he undoubtedly suffered as a result of his inability to obtain a key defense witness.

If a defendant can waive his rights under §3161(c)(2) of the Speedy Trial Act, contrary to its plain and express language, the law should be so clarified by this Court.

WHETHER A TRIAL COURT DENIES A DEFENDANT A FAIR AND IMPARTIAL TRIAL BY RESTRICTING CROSS-EXAMINATION OF A KEY GOVERNMENT WITNESS PURSUANT TO RULE 609(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE THROUGH EXCLUSION OF AN EXPUNGED FELONY CONVICTION WHERE THE WITNESS IS STILL ENGAGED IN THE CRIMINAL ACTIVITY WHICH PROVIDED THE BASIS FOR THE EXPUNGEMENT.

During trial, the trial court refused to allow trial counsel the opportunity to impeach the government's key witness, Marilyn Ferguson Martin, with two felony convictions for attempting to obtain controlled substances by fraud and obtaining controlled substances by fraud pursuant to the expungement provisions of Rule 609(c) of the Federal Rules of Criminal Procedure. Instead, the trial court permitted trial counsel the opportunity to question the government witness about the underlying facts surrounding the convictions. (T. 218-221)

The government contended that the introduction of the convictions was foreclosed by Rule 609(c) since the conviction had been the subject of a "pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted". Trial counsel contended that the circumstances surrounding the convictions did not qualify them for exclusion under Rule 609(c).

The testimony at trial revealed that the witness freely admitted that she was still engaged in the criminal activity which provided the basis for the expunged conviction.

Rule 609(c) of the Federal Rules of Criminal Procedure is designed to protect those individuals who have made a fresh start in life. The Rule would serve little function and would unduly restrict a defendant's Sixth Amendment right to confront the witnesses against him where, as here, the witness freely admitted that she was still engaged in the criminal activity which provided the basis for the expunged conviction. This Court in *Davis v. Alaska*, 415 U.S. 308 (1974) provided support for the position that a defendant's right to confront the witnesses against him should, in some circumstances, outweigh the state's interest in protecting expunged records. Here, there was no legitimate interest in protecting a witness who was still actively, and admittedly, engaged in the same criminal activity which brought about her original felony convictions.

The record of the Pulaski County Circuit Court reveals (Appendix H) that the government witness was sentenced by the Pulaski County Circuit Court under Act 378 of 1975, *Ark. Stat. Ann.* §43-2342. [2]

2
Section of 1975 Ark. Acts 378 provides:

> CERTIFICATE OF EXPUNGEMENT. Upon completion of sentence or probation imposed under this Act, the Commissioner shall direct that the record of the eligible offender be expunged of the offense of which the eligible offender was convicted, except under such circumstances as may be determined by rules and regulations promulgated by the Board of Correction upon the advice and recommendations of the Commission. And in the case of such expungement, the eligible offender shall be entitled to a Certificate of Expungement to that effect. Upon the expungement of such record, as to that conviction, the person whose record was expunged may thereafter state in any application for employment, license, civil right, or privilege, or in any appearance as a witness that he has not been convicted of the offense for which he was convicted and sentenced or placed on probation under the provisions of this Act.

In this instance, the provisions of the Arkansas Statute permitting expungment is in direct conflict with a Defendant's constitutional right to confront the witnesses against him as guaranteed in the Sixth Amendment to the United States Constitution where the witness, at the time of trial, is still actively engaged in the criminal activity which provided the basis for the expunged conviction.

This government witness was critical to its case. The Petitioner had a constitutional right to confront the witness and test her credibility with all admissible evidence available to trial counsel at the time of the testimony. In this case, the state's interest in providing an alternative method for sentencing offenders and expungement should give way to a defendant's paramount right to confront the witnesses against him and to seek the truth.

WHETHER A TRIAL COURT DENIES A DEFENDANT A FAIR AND IMPARTIAL TRIAL BY INSTRUCTING THE JURY PRIOR TO THE CLOSING ARGUMENTS IN VIOLATION OF RULE 30 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Prior to oral arguments, the trial court, without an agreement of counsel, instructed the jury on the law contrary to the provisions of Rule 30 of the Federal Rules of Criminal Procedure. The Rule, of course, specifically provides that the trial court shall instruct the jury at the conclusion of the arguments in the case.

The Eighth Circuit Court of Appeals held that because trial counsel failed to raise an objection to this procedure at the time of trial reversal could not result unless the trial court's action constituted "plain error." See Rule 52(b) of the Federal Rules of Criminal Procedure. The Eighth Circuit Court of Appeals went on to state that although the trial court erred in the procedure it did not find the error of sufficient magnitude to amount to "plain error" in the case. (Opinion, p. 11-12).

During closing arguments, counsel for the government, although having used up all of his time in the opening portion of his closing argument (T. 345), was permitted by the trial court to have the last word. His argument focused on some of the more prejudicial aspects of the case and after the jury retired they made a request of the trial court to see government's Exhibit No. 1 (the alleged false DEA form) and to obtain the definition of "distribute" (T. 346-347); Appendix I), which the trial court granted.

With the arguments being presented after the court's entire charge to the jury and permitting the jury to deliberate with one instruction (that of the definition of "distribute") the jury was obviously led to believe that the charges could be sustained, on Count II at least, by finding that the Petitioner had delivered a controlled substance to the possession of another without considering the crucial elements of (1) specific intent; and (2) the fact that the controlled substance must have been distributed outside the course of Petitioner's regular professional practice and without a legitimate medical purpose.

Accordingly, the reasons for requiring the jury instructions to be given to the jury at the conclusion of the arguments supports Petitioner's position that in all probability the jurors became confused on the applicable legal principals and/or forgot the essential elements of the crimes charged as well as the important elements of criminal intent.

The Eleventh Circuit Court of Appeals in *United States v. Dilg*, 700 F.2d 620 (11th Cir. 1983) reversed a defendant's conviction in a situation involving the timing of the jury instructions. The procedure employed by the trial court, clearly had an impact on the jury's deliberations and denied petitioner a fair and impartial trial. To permit the procedure employed by the trial court to stand in this case creates a double standard among the circuits that should be resolved by this Court.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Nos. 84-2350 and 85-1588

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeals from the United
	*	States District Court for the
John S. Ferguson,	*	Eastern District of
	*	Arkansas.
Appellant.	*	

Submitted: June 10, 1985

Filed: October 17, 1985

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and NICHOL*, District Judge.

ROSS, Circuit Judge.

Appellant Dr. John S. Ferguson appeals from a final judgment entered in the district court [1] for the Eastern District

*The HONORABLE FRED J. NICHOL, Senior United States District Judge for the District of South Dakota, sitting by designation.

1 The Honorable William R. Overton, Jr., United States District Judge for the Eastern District of Arkansas.

of Arkansas upon a jury verdict finding him guilty of filing a false statement with the Drug Enforcement Administration (DEA) in violation of 21 U.S.C. §843(a)(4)(A) [2] and for knowingly and intentionally distributing a controlled substance, dilaudid, without any legitimate medical purpose in violation of 21 U.S.C. §843(a)(1). [3] We affirm.

Appellant was on inactive status as a physician in California and as a result was prohibited from practicing medicine or prescribing medication. In January of 1982, following a complaint that appellant had obtained dilaudid, an analgesic drug six times more potent than morphine, and investigator with the California Board of Medical Quality Assurance, Shirley Poe (Poe), contacted appellant to remind him that he was not authorized to write or prescribe medication. After a second complaint, Poe requested that appellant surrender his Controlled Substance Act (CSA) registration, a permit registered with the DEA which allows medical doctors and other certified persons to legally handle controlled substances.

2
21 U.S.C. § 843(a)(4)(A) provides:

> (a) It shall be unlawful for any person knowingly or intentionally –
>
> * * *
>
> (4)(A) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter * * *.

3
21 U.S.C. § 843(a)(1) provides:

> (a) It shall be unlawful for any person knowingly or intentionally –
>
> (1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to * * * section 828 of this title;

On August 18, 1982, appellant signed a document agreeing to surrender his CSA registration and delivered a CSA registration to Poe. Poe discovered, however, that appellant had submitted a previously expired CSA registration and, after requesting appellant's current registration, Poe was told by appellant that his current registration had been destroyed. Poe then requested and received a written statement from appellant stating that his current registration had been destroyed.

Appellant thereafter moved to Arkansas and on August 26, 1983, applied to the DEA to renew his CSA registration. On his application, appellant was asked whether he had "ever surrendered a previous CSA registration or had a CSA registration revoked, suspended or denied, other than for a change of location or entrance into military service," to which appellant answered "No." On May 22, 1984, the Federal Grand Jury for the Eastern District of Arkansas returned a one-count indictment against appellant charging him with filing a false statement to the DEA in connection with his application for renewal of a CSA registration in violation of 21 U.S.C. §843(a)(4)(A). On August 20, 1984, a superseding indictment was issued and a charge of knowingly and intentionally distributing dilaudid without any legitimate medical purpose was added as a second count.

Count II of the indictment alleged that between May 2, 1981, and June 23, 1983, appellant injected his former spouse Marilyn Ferguson Martin (Marilyn Martin) with dilaudid and that, on at least one occasion, the injection was forced upon her. Marilyn Martin's sisters, Donna Martin and Vicki Wyatt testified that they witnessed appellant administer injections to Marilyn Martin. Dona Martin testified that on one occasion she observed appellant giving an injection to Marilyn Martin while she was unconscious. On June 21, 1983, Marilyn Martin was admitted to a Little Rock hospital in a comatose and critical condition. According to her treating physician, Dr. William Granger, large quantities of narcotic drugs were found in her body.

Prior to trial, the district court granted the government's motion in limine to prohibit defense counsel from impeaching Marilyn Martin concerning her prior convictions for attempting to obtain, and for obtaining, controlled substances by fraud. Pursuant to an Arkansas expungement statute, Marilyn Martin's record was expunged and a certificate of expungement, signed by a Pulaski County Circuit Judge, was issued to her.

Appellant filed two pretrial motions, one for relief from prejudicial joinder, and the second to exclude evidence of other crimes and bad acts of the appellant. Both motions were denied by the district court. Trial was held on September 18, 1984, and on September 20, 1984, the jury returned a verdict of guilty on both counts of the indictment. Appellant was sentenced to two years imprisonment on count II and three years probation as to count I, probation commencing upon appellant's release from imprisonment. From this conviction, appellant appeals on eight separate grounds.

I. Speedy Trial Act

Appellant argues that his convictions should be reversed and the indictment against him dismissed due to a violation of the Speedy Trial Act, 18 U.S.C. § 3161(c)(2), which provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Appellant was tried less than 30 days after the superseding indictment and argues that a violation under this provision of the Speedy Trial Act is "inadequate *per se*" and constitutes plain and reversible error, at least to count II of the superseding indictment. Appellant cites three Ninth Circuit cases in support of his position. *United States*

Harris, 724 F.2d 1452, 1455 (9th Cir. 1984); *United States v. Daly*, 716 F.2d 1499, 1504-05 (9th Cir. 1983); *cert. denied*, 104 U.S. 1456 (1984); *United States v. Arkus*, 675 F.2d 245, 248 (9th Cir. 1982).

This court has held that failure to raise an objection for violation under the Speedy Trial Act constitues a waiver. *United States v. Little*, 567 F.2d 346, 349 (8th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978). Because appellant failed to raise any objection to the trial court, appellant effectively waived his rights under the Speedy Trial Act. [5]

II. Impeachment Evidence of Prior Crimes

Rule 609 off the Federal Rules of Evidence provides in pertinent part:

> (a) *General rule*. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination * * *.
>
> * * *

5

Appellant's reliance on *Harris*, *Daly*, and *Arkus* is misplaced. Unlike the instant case, in each of those cases, the defendant made a timely objection to the district court alleging a violation under the Speedy Trial Act. Failure to make a timely objection to the trial court constitutes a waiver in the Ninth Circuit as well. *United States v. Daly*, 716 F.2d 1499, 1505-06 (9th Cir. 1983), *cert. denied*, 104 U.S. 1456 (1984). *United States v. Tercero*, 640 F.2d 190, 195 (9th Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981).

Because appellant waived his rights under the Speedy Trial Act, this court does not address the issue of whether appellant was entitled to an additional 30-day time period following the issuance of a superseding indictment. *Cf. United States v. Harris*, 724 F.2d 1452, 1455; *United States v. Guzman*, 754 F.2d 482, 486 (2d Cir. 1985); *United States v. Horton*, 676 F.2d 1165, 1169-70 (7th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983).

> (c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted. * * *.

Appellant argues that the expungement certificate signed by the Circuit Judge of Pulaski County was invalid because the government did not offer any evidence that the Director of the Arkansas Department of Correction took any action regarding the expungement. [6] Alternatively, appellant argues that the Arkansas expungement statute violates his constitutional right under the sixth amendment to confront witnesses brought against him. Both of these arguments are without merit.

The trial court is granted broad discretion in limiting the scope of the cross-examination of a witness. FED. R. EVID. 611(b); *United States v. Lee*, 743 F.2d 1240, 1249 (8th Cir. 1984). This discretion includes determining whether under FED. R. EVID. 609(c) there is sufficient evidence to

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6
Section 7 of 1975 Ark. Acts 378 provides:

> CERTIFICATE OF EXPUNGEMENT. Upon completion of sentence or probation imposed under this Act, the Commissioner shall direct that the record of the eligible offender be expunged of the offense of which the eligible offender was convicted, except under such circumstances as may be determined by rules and regulations promulgated by the Board of Correction upon the advice and recommendations of the Commission.And in the case of such expungement, the eligible offender shall be entitled to a Certificate of Expungement to that effect. Upon the expungement of such record, as to that conviction, the person whose record was expunged may thereafter state in any application for employment, license, civil right, or privilege, or in any appearance as a witness that he has not been convicted of the offense for which he was convicted and sentenced or placed on probation under the provisions of this Act.

expunge prior convictions. *United States v. Thorne*, 547 F.2d 56, 59 (8th Cir. 1976). In the instant case, the evidence consisted of an order of expungement signed by a Pulaski County Circuit Court judge. It was not an abuse of discretion for the trial court to conclude that the order of the Pulaski County Circuit Court Judge was sufficient evidence to satisfy FED. R. EVID. 609(c).

As for appellant's claim that the Arkansas expungement statute denies him his sixth amendment right to confront witnesses, it should first be noted that cross-examination of a witness as to prior convictions is not an absolute right to a criminal defendant in all cases:

> [The United States Supreme Court has neither held or suggested] that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past * * * criminal convictions.

Davis. v. Alaska, 415 U.S. 308, 321 (1974) (Stewart, J., concurring).

A violation of the confrontation clause occurs only where the limitation on the cross-examination could reasonably be expected to have a substantial effect on the jury's decision. *United States v. Farnsworth*, 729 F.2d 1158, 1162 (8th Cir. 1984). In the instant case, appellant was allowed to question, and did so question, Marilyn Martin as to the underlying facts of her prior convictions for fraud. Appellant was, therefore, afforded at least some opportunity to impair Marilyn Martin's credibility and to bolster his defense. *United States v. Witschner*, 624 F.2d 840, 844-45 (8th Cir.), *cert. denied*, 449 U.S. 994 (1980). Under these circumstances, appellant was not denied his sixth amendment right to confront witnesses.

III. Void For Vagueness

Appellant argues that the question on the application for renewal of his CSA registration which asked whether he had ever "surrendered" a previous CSA registration is unconstitutionally vague and cannot form the basis for his conviction under 21 U.S.C. § 843(a)(4)(A). Appellant argues that because the application did not ask whether appellant's relinquishment of his prior CSA registration was "voluntary" the question was unconstitutionally vague. Because this issue was not raised below, appellant's constitutional challenge is not cognizable on appeal unless it constitutes plain error. *United States v. Huckaby*, 698 F.2d 915, 920 (8th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

Penal statutes must define the criminal offense with sufficient clarity that ordinary people understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352 (1983); *United States v. Harris*, 347 U.S. 612, 617 (1954). Appellant does not complain that the "statute", 21 U.S.C. § 843(a)(4)(A), is unconstitutional but only that question 4(c) in the application for renewal of his CSA registration is unconstitutionally vague.

Appellant's assertion of vagueness is contrived. The language used in question 4(c) is forthright and direct and to construe it as appellant suggests would be to ignore its plain meaning and obvious intent. *Huddleston v. United States*, 415 U.S. 814, 831-32 (1974); *United States v. Willis*, 505 F.2d 748, 749 (9th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975).

IV. Sufficiency of the Evidence

Appellant argues that the government failed to prove that the response forming the basis of the criminal offense was false or that the allegedly false response was material. Appellant again presses his argument that because the application for renewal of his CSA registration did not state

whether appellant's "surrender" of his prior CSA registration was "voluntary", the government failed to introduce adequate evidence from which the jury could find the response false. Appellant further argues that there was no evidence that his answer had any effect on the DEA's decision of whether to renew appellant's CSA registration.

For the reasons previously stated, appellant's argument that his answer was not false because question 4(c) did not contain the word "voluntary" is without merit. Insofar as materiality of the false answer is concerned, the government introduced evidence by way of testimony of James N. Sheahan (Sheahan), Chief of the Registration Unit of the DEA, in which Sheahan testified that the questions on the form, including the question of whether an applicant had ever surrendered a previous CSA registration form, were relevant in deciding whether an applicant was qualified to handle controlled substances.

V. Evidence of Other Crimes and Bad Acts

Rule 404 of the Federal Rules of Evidence provides:

> (a) *Character evidence generally.* Evidence of a person's character or a trait of his character is not admisible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> > (1) *Character of accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
> >
> > * * *
> >
> > (3) *Character of witness.* Evidence of the character of a witness, as provided in rules 607, 608 and 609.
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove

> the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appellant argues that, contrary to Rule 404(b), the government was allowed to introduce highly prejudicial evidence relating to alleged crimes and bad character. Appellant presents 18 alleged errors, but only two objections to the admission of this evidence were made to the trial court. The two alleged errors for which objections were made must be reviewed under the standard of "abuse of discretion", *United States v. Hutchings*, 751 F.2d 230, 238 (8th Cir. 1984) and the remaining 16 alleged errors must be reviewed under the standard of "plain error". *United States v. Vitale*, 728 F.2d 1090, 1092-93 (8th Cir.), *cert. denied*, 105 S.Ct. 103 (1984).

As for the two evidentiary items for which objections were lodged, one concerned a question by the government to one of appellant's children asking whether she used cocaine with Martin and Martin's sister. The other objection concerned a question directed to appellant alleging that appellant distributed drugs to persons not called as witnesses. We find that it was not an abuse of the trial court's discretion to permit this evidence.

We have also carefully reviewed the remaining 16 evidentiary items and conclude that the admission of this evidence was not "plain error" by the trial court. *United States v. Vitale, supra.*

VI. Severance of Counts

Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part:

> If it appears that a defendant * * * is prejudiced by a joinder of offenses * * * in an indictment * * *, the court may order * * * separate trials of counts * * *.

Appellant filed a pretrial motion for relief from prejudicial joinder of counts I and II of the superseding indictment on grounds that evidence relating to illegal distribution of dilaudid would have been inadmissible in a trial based solely on the filing of a fraudulent application for renewal of a CSA registration. The trial court denied appellant's motion for severance.

Denial of a motion to sever is not grounds for reversal unless clear prejudice and abuse of discretion are shown. *United States v. Dennis*, 625 F.2d 782, 802 (8th Cir. 1980); *United States v. Losing*, 560 F.2d 906, 911 (8th Cir.), *cert. denied*, 434 U.S. 969 (1977). A showing of prejudice resulting in denial of a motion to sever requires more than a showing of a better chance of acquittal at separate trials. *United States v. Dennis, supra*, 625 F.2d at 802; *United States v. Bohr*, 581 F.2d 1294, 1300-01 (8th Cir.), *cert. denied*, 439 U.S. 958 (1978). Moreover, evidence is not excludable where the evidence of each crime would have been admissible on a separate trial of the other crime. *United States v. Dennis, supra.*

The government's theory is that appellant filed a fraudulent renewal application for a CSA registration in order to purchase drugs from pharmaceutical companies for illegal use and distribution. The government argues, in other words, that the appellant's motive for committing the offense alleged in count I of the indictment was established by evidence pertaining to count II of the indictment. Where evidence that appellant had committed one crime would be probative and thus admissible at the appellant's separate trial for another crime, appellant does not suffer any additional prejudice if the two crimes are tried together. *United States v. Dennis, supra*, 625 F.2d at 802; *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976). In the instant case, appellant's motive for falisfying his application for a CSA registration was related to his illegal

distribution of the controlled substance and, therefore, appellant did not suffer any clear prejudice and it was not an abuse of discretion to admit this evidence.

VII. Jury Instructions Prior to Argument

Rule 30 of the Federal Rules of Criminal Procedure provides:

> The court shall inform counsel of its proposed action upon * * * requests [for jury instructions] but the court shall instruct the jury *after* the arguments are completed. (Emphasis added).

The trial court, without any objection by appellant, instructed the jury prior to argument. Because appellant failed to raise an objection at the time of trial, appellant's objection will not result in reversal unless the trial court's action constituted "plain error". FED. R. CRIM. P. 52(b). Although the trial court erred in procedure we do not find the error of sufficient magnitude to amount to "plain error" and warrant reversal of the judgment. *Babson v. United States*, 330 F.2d 662, 666 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

VIII. Newly Discovered Evidence

Appellant argues that he should be granted a new trial based on new testimony to be elicited from appellant's former housekeeper, Joyce E. Langely (Langely). Appellant contends that Langely would testify that Marilyn Martin injected herself with drugs, that she attempted to conceal her drug use from appellant, and that she paid Langely to purchase drugs for her. The trial court denied appellant's motion for new trial.

The grant or denial of a motion for new trial based on newly discovered evidence is within the broad discretion of the trial court and the trial court's decision will not be reversed absent a clear abuse of discretion. *United States v.*

Lisko, 747 F.2d 1234, 1238 (8th Cir. 1984); *United States v. Wallace*, 578 F.2d 735, 742 (8th Cir.), *cert. denied*, 439 U.S. 898 (1978). This court has set forth five standards to be met before granting a motion for new trial based on newly discovered evidence:

> (1) the evidence must be in fact newly discovered, that is, discovered since the trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) it must be material to the issues involved, and (5) it must be of such nature that, on a new trial, the newly discovered evidence would probably produce an acquittal.

Lisko, supra, 747 F.2d at 1238; *Wallace, supra*, 578 F.2d at 742.

The trial court denied appellant's motion for new trial based on newly discovered evidence because Langley's testimony (1) was not in fact newly discovered since appellant knew Langely was a potential witness and merely claimed that he did not have sufficient time to locate her prior to trial; (2) would serve only to impeach the testimony of Marilyn Martin; and (3) would probably not produce an acquittal because there was ample evidence before the jury upon which to base the conviction.

We have reviewed the district court's order and do not find an "abuse of discretion" in denying appellant's motion for new trial. Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

Nos. 84-2350EA and 85-1588EA

United States of America,	*	
	*	
Appellee,	*	
	*	
v.	*	Appeals from the United
	*	States District Court for the
John S. Ferguson,	*	Eastern District of
	*	Arkansas.
Appellant.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

November 26, 1985

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

United States of America,	)	
	)	
v.	)	No. LR-CR-84-48
	)	
John S. Ferguson,	)	21 U.S.C. §843(a)(4)(A)

INDICTMENT

THE GRAND JURY CHARGES:

On or about August 26, 1983, in the Eastern District of Arkansas, JOHN S. FERGUSON did knowingly and intentionally furnish false material information on a Drug Enforcement Administration Form 224a entitled "Renewal Application for Registration Under Controlled Substances Act of 1970", in that the said JOHN S. FERGUSON, in response to question (c) on part four of the Form 224a, represented that he had not ever surrendered a Controlled Substances Act registration prior to August 26, 1983, whereas in truth and in fact, as John S. Ferguson then well knew, he had surrendered a previous Controlled Substances Act registration, thereby violating Title 21, United States Code, Section 843(a)(4)(A)

A TRUE BILL.

/s/ Cloie Morgan
FOREMAN

GEORGE W. PROCTOR
United States Attorney

/s/ George W. Proctor
UNITED STATES ATTORNEY/ASSISTANT

ROBERT J. GOVAR
Assistant United States Attorney
P.O. Box 1229
Little Rock, Arkansas 72203
501-378-5178
FTS 740-5178

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

United States of America,	)	
	)	
v.	)	No. LR-CR-84-48
	)	
	)	21 U.S.C. §841(a)(1)
John S. Ferguson,	)	21 U.S.C. §843(a)(4)(A)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That on or about August 26, 1983, in the Eastern District of Arkansas, JOHN S. FERGUSON, M.D., did knowingly and intentionally furnish false material information on a Drug Enforcement Administration Form 224a entitled "Renewal Application for Registration Under Controlled Substances Act of 1970", in that the said JOHN S. FERGUSON, M.D., in response to question (c) on part four of the Form 224a, represented that he had not ever surrendered a Controlled Substances Act registration prior to August 26, 1983, whereas in truth and in fact, as John S. Ferguson then well knew, he had surrendered a previous Controlled Substances Act registration, thereby violating Title 21, United States Code, Section 843(a)(4)(A).

COUNT II

That from on or about May 2, 1981, through on or about June 23, 1983, in the Eastern District of Arkansas and elsewhere, JOHN S. FERGUSON, M.D., did knowingly and intentionally, without legitimate medical purpose in the usual

course of his professional practice, distribute hydromorphone (Dialudid), a Schedule II narcotic controlled substance, thereby violating Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.

/s/ Cloie Morgan
FOREMAN

GEORGE W. PROCTOR
United States Attorney

/s/ Kenneth F. Stoll
UNITED STATES ATTORNEY/ASSISTANT

Robert J. Govar
Assistant United States Attorney
P. O. Box 1229
Little Rock, Arkansas 72203
501 378-5178
FTS 740-5178

Matthew Fleming
Special Assistant United States Attorney
c/o Medicaid Fraud Division
Office of the Attorney General
State of Arkansas
Justice Building
Little Rock, Arkansas 72201
501-371-7760

APPENDIX E

W. EDWARD TARVIN, P.A.
Attorney at Law
700 West Fourth Street
Little Rock, Arkansas 72201
(501) 374-1159

August 27, 1984

Judge Robert Faulkner
United States Magistrate
United States Post Office & Courts Bldg.,
Little Rock, AR 72201

RE: United States of America v. John S. Ferguson
LR-CR-84-48

Dear Judge Faulkner:

I was notified that my client, John Ferguson, was indicted for Count 2 on August 20, 1984. He was scheduled for an initial appearance on August 28, 1984. By this letter and by previous telephone conversations with the Court Clerk, I hereby waive my client's right for an appeal on Count 2. I will enter the defendant's plea to new charges prior to trial of this case.

Sincerely,

/s/ Ed Tarvin,
W. Edward Tarvin - by kms

WET:kms

cc: Mr. Robert Govar, Assistant U.S. Attorney, Room 327, 600 W. Capitol Avenue, P.O. Box 1229, Little Rock, AR 72203.

Judge William Overton, U.S. District Court, 502 U.S. Post Office & Courthouse, P.O. Box 1540, Little Rock, AR 72203

Files

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
_____ DIVISION

UNITED STATES PLAINTIFF

VS. NO. LR-CR-84-48

JOHN S. FERGUSON DEFENDANT

MOTION FOR RELIEF FROM
PREJUDICIAL JOINDER

Comes now the defendant, John S. Ferguson, by and through his attorney, W. Edward Tarvin, P.A., and for this Motion does state:

1. This Motion is made pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

2. The defendant is charged in Count I with giving false information on a government form. The defendant is charged in Count II with distributing a controlled substance.

3. Prior to the filing of Count II, the defendant filed a "Motion in Limine" with this Court contending that certain elemerts of the prosecution's anticipated case were not relevant to the crime of giving false information and should be excluded prior to trial.

4. Subsequent to the filing of defendant's Motion in Limine", the prosecution amended the judgment to include Count II.

5. The defendant contends that the prosecution seeks to introduce evidence at the consolidated trial which would

not be admissible in separate trials. The offenses are separate and the alleged acts constituting Count I (lying to the Government) has no relationship to Count II (distributing drugs). Evidence on Count II will be extremely prejudicial on the jury's consideration on Count I.

6. Because of the potential prejudicial effect of joinder, the defendant requests separate trials on Count I and Count II.

WHEREFORE, the defendant requests relief from prejudicial joinder together with all other proper relief.

BY: /s/ Ed Tarvin
W. EDWARD TARVIN
Attorney for defendant
700 W. Fourth Street
Suite 200
Little Rock, AR 72201
(501) 374-1159

CERTIFICATE OF SERVICE

I, W. Edward Tarvin, certify that I have served a copy of the foregoing Motion to Robert Govar, Assistant U.S. Attorney, Room 327, 600 W. Capitol Ave., P.O. Box 1229, Little Rock, Arkansas 72201 by hand delivering a copy this 18th day of September, 1984.

/s/ Ed Tarvin
W. EDWARD TARVIN

APPENDIX G

SWORN STATEMENT OF JOHN S. FERGUSON, a witness produced at the request of Sam Perroni, taken on the 7th day of February, 1985, before Kimberly A. Hamm, RPR, CSR, CCR, at the office of Perroni & Rauls, 1523 S. Broadway, Little Rock, Arkansas 72202.

JOHN S. FERGUSON

the witness hereinbefore named, being first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

/s/ Kimberly A. Hamm

Q. Would you please state your full name for me.

A. John Ferguson.

Q. Mr. Ferguson, are you the same John Ferguson that was the Defendant in the case of United States of America versus John Ferguson, a criminal case that was tried in the United States District Court for the Houston District of Arkansas in front of Judge Overton; is that right?

A. Right.

Q. When was that case tried?

A. September, I think.

Q. Of 19___

A. 1984. Is that right?

Q. It doesn't matter. Now, do you recall when you were indicted in that particular case in connection with a one-count indictment?

A. It was approximately two months before then.

Q. Can you tell me what that one-count indictment involved, generally?

A. Charged me with turning in a fraudulent application form and making a false statement on an application form for a narcotics license.

Q. Did you appear before a judge for plea and arraignment on that particular indictment?

A. Yes, I did.

Q. You don't need to give me the date, but there was a time when you did appear before a judge for plea and arraignment on that particular one-count indictment.

A. Yes.

Q. And you entered a not guilty plea.

A. I did.

Q. Did there come a time when you became aware that the Government had obtained a superseding indictment from the Grand Jury which contained an additional count?

A. Yes, approximately three days before the trial.

Q. And you became aware of that?

A. That's right.

Q. How did you become aware of it?

A. My sister called me several days before the trial and asked me if I had seen an article in the paper, the Arkansas Democrat, in which I had been indicted for an additional charge; and I told her I had not. I asked her to send me the clipping, which she did. It got there, as I recall three days before the trial.

Q. And then once you got the clipping, you read the clipping—

A. Yes.

Q. —and it said that you had been indicted, and there was another count in the indictment.

A. That's right.

Q. What was the second count, generally?

A. The way I read it, it said that I had been guilty of the distribution of the drug, Dilaudid.

Q. After you read this, did there come a time when you attempted to try to get a hold of any witnesses that might help you in your case to prove that this is not the case; that you had not illegally distributed Dilaudid?

A. That's true. As soon as I found out about this, I talked to my wife at length about the possible seriousness of the charge, and decided to try to get in touch with my previous housekeeper, who had been working for Marilyn Ferguson and myself, and really was the only one who knew what had occurred between the two of us during that period of time.

Q. And that's while you were living in Heber Springs?

A. Yes.

Q. What is the housekeeper's name?

A. Her name is Joyce Langley.

Q. And how did you try to get a hold of her?

A. I called over at the Red Apple Inn, where she had worked at one time, I knew she had worked over there; it's a restaurant there in Heber Springs. I knew she had been previously employed over there, and I called to see if they could help me locate her.

Q. Did you find her location?

A. Several days later, some lady—and I don't know who it was—called me back. I had left my number there if anyone, you know, had any information, I asked them to please give me a call. Some lady called me back—I forget her name—and said that she was aware that Joyce Langley was in the area, but she was living somewhere in the country out from Rosebud and had no telephone. She also said she had no idea how I could get in touch with her, but recommended that I just leave my number there and they would call me if they heard from her, or they would have her call me.

Q. How close was this to the trial?

A. Two days before the trial.

Q. And so then did there come a time when you made contact with your attorney and try to conference with him about the second count in the indictment?

A. I called him immediately when I got the clipping, which was three days before the trial and wanted to know what was going on. I was confused; I had not received any

rtunity to appear before the Grand Jury; I didn't know this charge had been brought against me, and I wanted to k[illegible] what was going on. He informed me that it was really of no serious consequence because it was just a tactical move on the part of the prosecutors to enable them to bring in additional information and evidence that they couldn't bring in on the single charge, and I was not to worry about it.

Q. Did you mention to him about this witness?

A. I told him that I was trying to get in touch with Joyce Langley; that I felt that she was of extreme importance as a witness in this thing. He indicated that he didn't feel that I should go to any extra trouble; that if I did contact her or she did contact me, to let him know. But he said under the circumstances, he didn't think there was any way we could contact her and there was no time, and there was just no way to bring her in at that late date.

Q. Did there come a time when you did make contact with Joyce Langley?

A. Yes. Several months, I would say roughly in October or November, she did call me.

Q. And this was after the trial?

A. This was two months after the trial, at least.

Q. And after you were convicted.

A. After I was convicted.

Q. So then you did make contact with her and you did ask her if she would be willing to give a statement about what she had seen and heard while she was working at your house?

A. No, I didn't at that time. I felt at that point it was too late to do anything about this situation, but I told her to keep in touch with me. The more I thought about it, the more I thought I should contact her; and it took me until January to set up any kind of an appointment with her. She didn't have a car and she had three kids. And I'm in no condition—I'm not supposed to drive, and I wasn't in any condition to get with her before that time; so I didn't get together with her until February.

Q. 1985?

A. 1985.

* * * END OF STATEMENT * * *

APPENDIX H

IN THE CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS PLAINTIFF

V. Nos. CR-80-1231
CR-80-2144

MARILYN KAYE ROGERS DEFENDANT
DOB: 1-13-52

ORDER TO EXPUNGE THE RECORD

On this day is presented to the Court the motion of defendant seeking an Order to Expunge the Record in the above entitled matters, from all of which the Court doth find:

1. That the defendant has complied with the written rules of the Court, has paid the fines and Court costs and has violated no other laws of the State of Arkansas.

2. That the defendant is entitled, pursuant to Act 546 of 1975 to have any record of arrest, charge, plea or judgment in this matter expunged from the record.

IT IS, THEREFORE, ORDERED that the Clerk of this Court shall expunge the record of this defendant in the above entitled causes, and the same shall be, for all

purposes, obliterated and this defendant shall have no record of arrest, plea or conviction regarding this matter.

IT IS SO ORDERED.

/s/ Floyd J. Lofton
CIRCUIT JUDGE

7/25/84
DATE

APPROVED:

/s/ J. K. Mason
PROSECUTING ATTORNEY

APPENDIX I

#1
11:35

We need copy of Judge's Instruction pertaining to definition of distribution.

Copy of Exhibit I

/s/ Thomas Eupchuck
FOREMAN